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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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4 April, 2000

Mr. Larry Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 96-98

Dear Mr. Strickling:

At staff's request, MCI WORLDCOM, Inc. (MCI WorldCom) writes in response to a series of incumbent local exchange carrier (ILEC) *ex parte* filings proposing an expanded restriction on the use of combinations of unbundled network elements. These ILEC proposals effectively would force requesting carriers wishing to make use of loop-transport functionalities to obtain these functionalities through the purchase of ILEC special access services, rather than through the purchase of unbundled loop-transport element combinations (EELs), even when the requesting carriers are providing exclusively or significantly local services. As we show in what follows, if the Commission is determined to impose a limited use restriction to protect ILEC access service revenues,¹ it should create a simple self-certification process that can be audited by identifying the services to which the end user subscribes.

The self-certification process should work as follows:

- First, upon receiving a request from a carrier to convert circuits that currently are purchased out of the special access tariff to EELs, if that request indicates that the circuits involved are used exclusively for local services, or used to provide a significant amount of local service, the ILEC must immediately process the conversion.
- Second, the fact that a particular circuit is connected to a port on a Class 5 switch (or its equivalent) should establish an irrebuttable presumption that the circuit is used exclusively to provide local service. Disputes over whether a circuit is connected to such a switch can

¹ As MCI WorldCom has argued in its Comments on the Fourth Further Notice of Proposed Rulemaking, the Commission's limited use restriction is unlawful, discriminatory, and bad public policy. It violates the plain terms of the Act, and it is designed to protect revenues that the Commission has determined benefit only ILEC shareholders, and not any larger public purpose. It is not the purpose of this *ex parte* to press these arguments here, although we do not disavow them.

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be resolved by an audit of customer bills.

- Third, where a circuit is used to provide both local and dedicated access services, the use of at least ten percent of the activated channels for local services should make the circuit “significantly local.” The connection of those channels to ports on a Class 5 switch (or its equivalent) should create an irrebuttable presumption that they are used significantly to provide local service. Once again, any dispute should be resolved by an audit of customer bills.
- Fourth, requesting carriers should be entitled to full refund of the difference between access and unbundled network element pricing for circuits that are exclusively or significantly local, dating back to the point in time when they first requested a conversion.
- Fifth, there should be no installation non-recurring charges or other charges for performing what is essentially a billing conversion.
- Sixth, in the event that a requesting carrier’s claim of significant local usage is challenged, that carrier must be prepared to prove to a third-party auditor that the challenged lines satisfy these criteria. In the event the audit reveals that the line was indeed used significantly for local service, the ILEC should pay the audit expenses.

I. Background

In its Third Report and Order, and then in an expanded form in the subsequent Supplemental Order, In re Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, the Commission on a temporary basis imposed a limited restriction on the use of unbundled network elements by interexchange carriers (IXCs). Specifically, the Commission determined that:

until resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). Supplemental Order ¶ 2.

The stated purpose of this temporary and limited restriction is to prohibit requesting carriers (IXCs or competitive local exchange carriers (CLECs)) from using combinations of unbundled network elements leased from the ILECs as a substitute for special access services. Id. ¶ 4.

The Commission took pains to make clear that requesting carriers nevertheless should be able to take advantage of the Commission’s “combination” rule, Rule 315(b), to use combinations of unbundled network elements efficiently to provide competing local services. The Commission noted with disapproval that

Experience over the last year demonstrates that the incumbent LECs have refused to provide access to network elements so that competitors could combine them, except in situations where competitive LECs have collocated in the incumbent's central offices. Third Report and Order ¶ 482.

The Commission stressed that

to the extent an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our rule 315(b) require the incumbent to provide such elements to requesting carriers in combined form. . . . In particular, the incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs. Moreover, requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices. *Id.* ¶ 480.

Addressing the most common discriminatory practice used by the ILECs to make combinations of network elements practically unavailable to incumbents, the Commission further stressed that incumbent LECs may not limit a competitor's ability to access network elements in order to combine them to collocation arrangements. *Id.* ¶ 482 n.973.

Consistent with these stated policies, the Commission's provisional use restriction on UNEs as a substitute for access services was carefully tailored in an effort to preserve requesting carriers' rights to use UNE combinations for all other telecommunications purposes. Thus, while prohibiting the use of loop and transport combinations to provide access to interexchange services, the Commission expressly allowed such conversions when they facilitated the provision of local service:

This constraint does not apply if an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer. It therefore does not affect the ability of competitive LECs to use combinations of loop and transport (referred to as the enhanced extended link) to provide local exchange service. It also does not affect the ability of competitive LECs that are collocated and have self-provided transport (or obtained it from third parties), but are purchasing unbundled loops, to provide exchange access service. Supplemental Order ¶ 5.

Indeed, the Commission took steps to assure that compliance with its limited use restriction could not be used, even temporarily, by the ILECs as a pretext to deny CLECs nondiscriminatory access to unbundled network elements for non-access purposes. Thus, the Commission determined that requesting carriers, including IXCs and CLECs, could convert existing combinations of loop and transport elements by self-certifying that they are providing a significant amount of local exchange service.

Because we intend the constraint we identify in this Order to be limited in duration, we do not find it to be necessary for incumbent LECs and requesting carriers to undertake auditing processes to monitor whether or not requesting carriers are using unbundled network elements solely to provide exchange access service. We expect that allowing requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements will not delay their ability to convert these facilities to unbundled network element pricing, and we will take swift enforcement action if we become aware that any incumbent LEC is unreasonably delaying the ability of a requesting carrier to make such conversions. Supplemental Order ¶ 5 n. 9.

If the Commission acts temporarily to prevent the use of UNE combinations to provide traditional special access services, it should remain true to its stated goal of limiting only that use, while at the same time preserving the requirement that ILECs make combinations available for all other telecommunications purposes.

It has become clear that the largest ILECs have no intention of complying with the Commission's seemingly simple framework for conversions. Instead, they continue to assert their right to reject requests for unbundled network element pricing in a variety of circumstances that have nothing to do with the Commission's stated purpose of preventing conversion of loop and transport combinations used to provide exchange access services. MCI WorldCom urges the Commission to remind the ILECs of their duty to convert all loop and transport combinations to unbundled network element pricing where the requesting carrier self-certifies that the combination is used to provide a significant amount of local exchange service. The Commission also should clarify that requesting carriers are entitled to full refunds of the difference between unbundled network element and access prices where the ILEC has denied (or delayed implementation of) requests for conversions of loop and transport combinations used to provide local exchange services.

This unlawful ILEC refusal to provide UNE combinations has been accompanied by a series of ILEC *ex parte* filings that propose changes to the Commission's temporary use restrictions. These proposals adopt three sets of restrictions not contained in the Commission's rules and not necessary to prevent CLECs from using UNE combinations to provide traditional special access services. Instead, these proposals plainly are designed to make it practically impossible for CLECs to use UNE combinations to provide any services, including local services. Specifically, the ILECs first propose discriminatory collocation requirements on virtually all UNE combinations. Next, the ILECs claim a right to deny CLECs the ability to "commingle" a leased UNE circuit through multiplexing onto to higher transport capacity. Finally, the ILECs propose that CLECs be required to prove to ILECs before they are allowed to lease combined UNEs that the leased UNEs will carry only certain patterns of traffic, proof that would be so difficult to obtain that CLECs as a practical matter will never even attempt to carry local traffic on leased

UNE combinations.

In what follows MCI WorldCom will address these three sets of unlawful restrictions in turn, and then will propose a far more simple and effective regulation that is true to the Commission's goal of preserving the CLECs' right to use UNE combinations for local traffic, while at the same restricting CLECs from using UNE combinations to provide traditional special access services.

II. Collocation

According to Bell Atlantic, "a carrier may convert an existing special access service to a combination of network elements only where ... the service is connected to an existing collocation arrangement..." Attachment to March 14, 2000 *ex parte* letter of Bell Atlantic. The Commission has not imposed this requirement, and it should not do so now.

As indicated above, the Commission has explicitly rejected ILEC arguments that collocation should be required as a precondition to obtaining access to combinations. (Third Report and Order ¶ 482 and n. 973.) The contrary arguments offered by Bell Atlantic and SBC in their March 20, 2000 *ex parte* letter and by Bell Atlantic in its March 14, 2000 *ex parte* letter and Attachment for a collocation requirement do not hold even a thimble-full of water.

In the attachment to the March 14 letter, Bell Atlantic points to language in paragraph 486 of the Third Report and Order that EELs may attach to collocations at CLEC entrance facilities. But in this passage the Commission was merely describing the typical network configuration through which a CLEC self-provides entrance facilities. While such a description was relevant to the entrance facility restriction in the Third Report and Order, it is irrelevant to the broader use restriction established by the Supplemental Order. The Supplemental Order did not add a use restriction to the entrance facility restriction. Instead, it substituted the entrance facility restriction with the use restriction.² By replacing the entrance facility restriction with the use restriction, the Commission made any collocation requirement unnecessary to the goal of assuring that access traffic be carried over ILEC access services. Given the broader use restriction imposed by the Supplemental Order, the only effect of a collocation requirement would be to unnecessarily burden CLECs who wish to carry local traffic not covered by the use restriction.

SBC and Bell Atlantic nevertheless allege in their March 20 letter that a collocation requirement is necessary in some circumstances to "avoid[] gaming that could undermine the special access market." They maintain that "the collocation requirement serves as one safeguard to assure that users have actually invested in providing local service and are not merely seeking wholesale 'paper' conversion of non-local special access circuits." But it is patently absurd to

² The ILECs implicitly conceded this point by commenting only on the use restriction in their Comments and Reply Comments to the Fourth Further Notice.

suggest that collocation is needed for this purpose.³ The fact that a particular circuit terminates or does not terminate in a collocation arrangement does not mark the circuit as an access circuit or a local circuit. Instead, collocation requirements burden all uses of leased elements. As MCI WorldCom shows in what follows, there are far more targeted regulations that address the ILECs' "gaming" concerns. Indeed, it is difficult to imagine a restriction less targeted at access services than the discriminatory collocation requirement proposed by the ILECs.

As the Supplemental Order makes clear, the purpose of any use restriction ought to be to preserve for the Fourth FNPRM issues related to the policy and legal ramifications of applying the unbundling rules in a way that could cause a significant reduction of ILEC special access revenues prior to full implementation of access and universal service reform. But the status quo sought relates only to ILEC special access revenues generated by the provision of traditional special access services, not to ILEC special access revenues generated in recent years because CLECs had no choice but to purchase network elements through special access tariffs. The use restriction imposed by the Supplemental Order is sufficient for that purpose. An additional collocation requirement is unnecessary and discriminatory.

III. Commingling

In many cases, CLECs such as MCI WorldCom have purchased special access circuits to provide local exchange services. Some of those purchases occurred prior to the implementation of the unbundling requirements of the 1996 Act; others occurred subsequent to the implementation, but as a result of the ILECs illegally denying CLECs access to UNEs. To take advantage of economies of scale, MCI WorldCom and other CLECs try to extend their DS-3 trunks as far into the ILEC network as possible, and use DS-1s to bring traffic from more distant end offices to the DS-3. Those DS-1s can carry local traffic or non-local traffic. As shown in the attached diagram, those circuits commonly consist of DS-1 channel terminations, with or without DS-1 channel mileage, that are multiplexed onto DS-3 entrance facilities that carry both local and non-local traffic. Now that there is an opportunity for CLECs to purchase their local transport via UNEs instead of special access, they want to convert those DS-1 lines used to carry local traffic to UNEs, bring those DS-1s to an end office with a DS-3, and multiplex the DS-1s onto the DS-3 they have purchased out of the ILECs' special access tariffs. But the ILECs insist that these circuits, even if used entirely to provide local exchange service, cannot be converted to unbundled network element pricing if they continue to be multiplexed over the DS-3 entrance facility trunks. Instead, they would require CLECs to purchase redundant "local" multiplexing and "local" transport facilities simply to avoid what the ILECs view as impermissible

³ For example, whether or not it is collocated, there can be no doubt that a carrier like MCI WorldCom has actually invested in providing local services, when it has, *inter alia*: (1) installed a Class 5 local switch; (2) installed a fiber optic transport network; (3) negotiated and arbitrated an interconnection agreement; (4) established interconnection trunks for the exchange of traffic; (5) and obtained numbering resources and ported end user telephone numbers.

“commingling” of local and access circuits on a DS-3 facility.⁴ The circuits used for local would then be segregated onto these redundant facilities before they could be eligible for unbundled network element pricing.

There is no justification for this refusal to commingle circuits on a DS-3 facility. It forces needless inefficiencies on competitive carriers. CLECs would effectively be required to operate two overlapping networks – one for local traffic, and one for access traffic – even if there were ample spare capacity on the leased access circuits to carry all traffic. It also would needlessly take down customers’ services during any circuit migration. The ILECs themselves do not pointlessly run two overlapping networks, and neither do they subject their customers to needless outages. Their refusal to allow “commingling” is the most blatant form of discrimination imaginable, and one that has nothing to do with preserving access service revenues. The Commission should order the ILECs to allow these local circuits to be converted to unbundled network element pricing.

With the commingling of circuits, the transport facility would remain dedicated to the use of a single carrier. Conversion of these circuits does not even necessarily require any change to the price of the DS-3 for which the requesting carrier has already paid.⁵

Commission staff has asked MCI WorldCom to respond to the ILECs’ claim that allowing commingling would result in the widespread conversion of special access circuits to EELs. There is no basis whatsoever for this claim. SBC appears to assume that commingling would necessarily entail a change in the price of the DS-3. As just explained, this is simply not the case. Moreover, since any change to the DS-3 price would simply reflect the fact that a portion of that facility is used to provide local service, such a change would be fully consistent with the policy described in the Third Report and Order and the Supplemental Order, since the ILECs still would be compensated for access services carried over access lines at access service rates.

Finally, SBC asserts in its Opposition (at p. 44) that since commingling is not contemplated by a Bell Atlantic *ex parte* that was cited in a footnote in the Supplemental Order, it cannot be reconciled with that Order. The Commission should reject this interpretive sleight-of-hand. The footnote makes no mention of commingling one way or the other. It references Bell

⁴ In practice, CLECs often are further constrained by ILECs refusing to make these multiplexing facilities available as unbundled network elements or by the unavailability of DS-3 capacity.

⁵ The price of the DS-3 should surely be “ratcheted” downward as individual DS-1s are converted to unbundled network element pricing, so that CLECs are paying UNE rates for local circuits, and access rates for access circuits. However, the pricing issue is distinct from the preliminary question of “commingling” itself. Even if CLECs for some reason were forced to pay access rates for UNE traffic carried over access circuits, they still should be permitted to commingle all of their traffic on their leased access lines.

Atlantic's *ex parte* as one example of how to identify a significant local component of network traffic. It cannot plausibly be read to endorse all of the conditions described in Bell Atlantic's letter.

A ban on commingling is entirely unrelated to the goal of preventing conversion of traditional special access services to unbundled network element pricing. If the Commission acquiesces in the ILECs' proposed prohibition on commingling, all it will accomplish is to withhold important network efficiencies from competitive carriers.

IV. The ILECs' Proposed Prior Certification "Significant Local Use" Restriction

The Supplemental Order's use restriction does not apply when an IXC uses a loop and transport combination to provide a significant amount of local exchange service, in addition to exchange access service to a particular customer. Nor does it apply when a CLEC uses a loop and transport combination exclusively to provide local exchange service. Nonetheless, ILECs have repeatedly refused to convert circuits used by MCI WorldCom exclusively for the provision of local service. The Commission must put an end to this lawless behavior.

The ILECs have attempted to "codify" their refusal to convert circuits by getting the Commission to replace its self-certification process with a complex prior certification process that would effectively make the use of EELs impractical for the provision of any telecommunications service. MCI WorldCom has presented a detailed critique of that ILEC proposal in its *ex parte* letter of March 10, 2000, and will not repeat that analysis here.

We do note, however, that in the attachment to its March 14 *ex parte* filing, Bell Atlantic claimed that "a carrier may convert an existing special access service to a combination of network elements only where ... the combination of network elements will be used to provide a significant amount of the customer's local exchange service." The insertion of the phrase "the customer's," into the Commission's formulation of "significant amount of local exchange service," is a transparent attempt by the ILECs to make it more difficult for competitive carriers to exercise their statutory rights. Even if a customer obtains 99.9% of its local service from the incumbent, if that customer purchases a single DS-0 from a competitor for local traffic, that competitor is entitled to unbundled network element pricing for that solitary circuit. This is a very important issue as most customers initially prefer to turn to CLECs for only a small portion of their total local traffic.

V. Alternative Interim Rule

While the ILECs' proposal would effectively keep CLECs from using UNE combinations for all purposes, it is not hard to construct a simple use restriction that would accomplish the Commission's far more narrow purpose while preserving the status quo set out in the Third Report and Order. If the Commission persists in imposing a use restriction temporarily to keep CLECs from offering competitively-priced access services, MCI WorldCom recommends that the

Commission clarify the duty of ILECs to comply with conversion requests, as well as the standards that would govern any disputes over the propriety of a particular request, in the following manner:

First, upon receiving a conversion request that indicates that the circuits involved are used either exclusively for local services, or used to provide a significant amount of local service, the ILEC must be required immediately to process the conversion. Any dispute over whether or not the requesting carrier is entitled to unbundled network element pricing for a particular circuit should be dealt with separately as part of the Commission's complaint process, or by another dispute resolution process. The conversion should proceed with the dispute settled by an audit of the customer bill associated with the circuit at issue. The ILECs' "prior clearance" proposal is a recipe for still more foot-dragging, and is not necessary because any dispute involves only the pricing of circuits, and thus can be completely resolved after the conversion takes place.

Second, the fact that a particular circuit is connected to a port on a Class 5 switch (or its equivalent) should establish an irrebuttable presumption that the circuit is used exclusively to provide local service. Disputes over whether a circuit is connected to such a switch can be resolved by an audit of customer bills. Such a circuit is used only to provide local exchange and switched access services. Since the Commission is concerned only with preserving ILEC dedicated access revenues, and not with preserving ILEC local or switched access revenues, these circuits do not implicate the issues raised in the Fourth FNPRM. Accordingly, there is no reason to deny CLECs unbundled network element pricing for such circuits.

Third, where a circuit is used to provide both local and dedicated access services, the use of at least ten percent of the activated channels for local services should make the circuit "significantly local." The connection of those channels to ports on a Class 5 switch should create an irrebuttable presumption that they are used significantly to provide local services. Once again, any dispute should be resolved by an audit of customer bills.⁶ Not only is a ten percent rule consistent with the Commission's approach in other circumstances,⁷ but it is also a sufficiently high threshold to discourage CLECs from attempting to "game" the system. For example, this rule would require that at least three of the activated channels on a fully utilized DS1 be dedicated to providing local services. These channels would then occupy valuable transport and switch port capacity, thus consuming capital that the CLEC requires to generate revenues. Moreover, the dedication of channels to local services would reduce the number of channels available for non-

⁶ Only if the carrier provides local services over non-local network facilities, such as a long distance switch, should it be necessary for an audit to examine minutes of use. Many of MCI WorldCom's customers purchase redundant, reserve local service from MCI WorldCom, service for which they have no usage unless their ILEC service goes down. Since there is no use of those circuits under normal circumstances, minutes-of-use measurements will not indicate whether the circuits are actually being used for local traffic.

⁷ E.g., PIU calculations.

local services, thereby diminishing the effective discount from unbundled network element pricing for a carrier that attempts to "game" the system. In these circumstances, the dedication of at least ten percent of a circuit's activated channels to local service is more than sufficient to demonstrate that a carrier is providing a significant amount of local service.

Fourth, CLECs should be entitled to full refund of the difference between access and unbundled network element pricing for circuits that are exclusively or significantly local dating back to the point in time when they first requested a conversion. The Supplemental Order limits, but does not establish, the rights of CLECs. Those rights are based on the Telecommunications Act and the CLECs' interconnection agreements. Accordingly, any CLEC with a contractual right to combinations is owed a refund dating back to its first request for conversion.

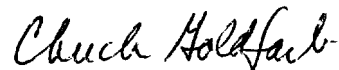
Fifth, there should be no installation non-recurring charge on other charges for performing what is essentially a billing conversion.

Finally, in the event that the CLECs' claim of significant local usage is challenged, the CLECs must be prepared to prove to a third-party auditor that the challenged lines satisfy these criteria. This audit is easily accomplished. A customer bill will show exactly which services the customer has purchased. There should be no need to audit usage records unless a carrier is using the same channel to provide local and non-local services. In the event the audit reveals that the line was indeed used significantly for local service, the ILEC should pay the audit expenses.

Adoption of this framework will allow carriers to make strategic and network investment decisions with confidence in their ability to convert special access circuits used to provide local services to unbundled network elements. Moreover, it will also serve the Commission's stated (if unlawful) goal of preserving ILEC special access revenue from circuits used to provide traditional special access services.

We look forward to meeting with you and your staff to discuss this issue at greater length.

Sincerely,



Chuck Goldfarb
Director
Law and Public Policy

cc. Chairman Kennard
Commissioner Ness
Commissioner Tristani
Commissioner Powell
Commissioner Furchtgott-Roth

Jake Jennings
Jody Donovan-May
Robert Atkinson
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